

January 28, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Motion for Reconsideration

Name of Petitioner: Terry M. Apodaca

Date of Filing: December 21, 2007

Case Number: TFA-0237

This Decision concerns a Motion for Reconsideration of a Decision and Order that the Department of Energy's (DOE) Office of Hearings and Appeals (OHA) issued to Terry M. Apodaca on Dec. 19, 2007, in case TFA-0229. In that case, Ms. Apodaca filed a Freedom of Information Act (FOIA) Request with the National Nuclear Security Administration (NNSA). The NNSA issued her a determination. Ms. Apodaca appealed the determination to OHA, challenging the adequacy of the NNSA's search. OHA denied Ms. Apodaca's appeal in part because she filed her appeal nearly two months past her regulatory filing deadline. If this Motion for Reconsideration were granted, OHA would review the adequacy of the NNSA's search.

I. Background

On April 10, 2007, Ms. Apodaca filed a FOIA request with the NNSA for documents regarding personally identifiable information (PII) breaches. The NNSA provided Ms. Apodaca documents. *See Terry M. Apodaca* (Case No. TFA-0229) (Dec. 19, 2007).¹ Ms. Apodaca challenged the adequacy of the NNSA's search. In particular, Ms. Apodaca appealed:

- (i) The NNSA's determination that it could not locate documents at the Office of Human Capital Management Services, the Information Technology Department, the Facility Security Officer, the Inquiry Official, and Program Manager for Incidents of Security Concern;
- (ii) The NNSA's failure to process her request at the Cyber Security Site Manager's Office (CSSM), as she had requested after filing her FOIA request;
- (iii) The NNSA's failure to process her request at the Y-12 facility, which Ms. Apodaca claims experienced a March 2007 PII breach; and

¹ The Federal Energy Guidelines reporter has not yet assigned this Decision volume and section numbers.

- (iv) The NNSA's failure to produce documents regarding a PII breach "a few years back" that "affected over 1,500 NNSA employees."

OHA denied Ms. Apodaca's appeal regarding (i) and (ii) because she filed her appeal on Oct. 31, 2007, nearly two months past her 30-day regulatory deadline of Sept. 3, 2007.² OHA found that the NNSA's search regarding (iii) was adequate: the NNSA had contacted every source in its experience that was likely to have responsive records, and none had suggested searching the Y-12 facility. OHA remanded Ms. Apodaca's appeal regarding (iv) because the NNSA agreed to conduct that search. *Id.*

Ms. Apodaca filed the present Motion for Reconsideration on Dec. 21, 2007. Ms. Apodaca argues that OHA should reconsider its Decision regarding (i)-(iii) for two reasons. First, her appeal was in fact timely. Shortly after receiving the NNSA's determination dated Aug. 3, 2007, she contacted the NNSA to informally resolve her concerns. Ms. Apodaca's Motion included an e-mail showing that she contacted the NNSA on Aug. 31, 2007 regarding (iii) (the NNSA search at the Y-12 facility) and (iv) (the "hacker incident"). Motion for Reconsideration, received Dec. 21, 2007.

Second, Ms. Apocada asks OHA to reconsider its Decision regarding (iii) because the NNSA employee who processed Ms. Apodaca's FOIA request for information on breaches is a member of the office that resolved the breach described in (iii). Ms. Apodaca knows this because she processed the FOIA request that started the breach. Meanwhile, NNSA employees who processed Ms. Apodaca's FOIA request for information on breaches earlier provided Ms. Apodaca documents regarding the breach described in item (iii). *Id.*

Ms. Apodaca raises two additional issues in her Motion for Reconsideration. She asks OHA to require the NNSA to conduct "additional processing"³ regarding (i)-(iii) because she is "being treated with less respect and credibility than the other [FOIA requesters]. . . ." Lastly, she states that OHA "did not address that portion of my appeal pertaining to Mr. Dick Speidel not responding to my request. . . . [The NNSA Service Center] has also not responded to me about this." *Id.*

² OHA reserves the discretion to accept an untimely appeal to promote administrative efficiency, if, upon consulting the determination issuer, review remains practicable, given the determination issuer's possible file relocations, staffing changes, or other circumstances. *See, e.g., Nevaire S. Rich*, 27 DOE ¶ 89,241 (1999) (Case No. VFA-0523); *Int'l Bhd. of Elec. Workers*, 27 DOE ¶ 80,152 (1998) (Case No. VFA-0421). In case TFA-0229, OHA declined to accept Ms. Apodaca's appeal because NNSA employees who conducted the searches could not recall the search details.

³ Ms. Apodaca actually asks OHA to "reverse the decision made and remand my appeal in total for additional processing" (emphasis added). Motion for Reconsideration, received Dec. 21, 2007. However, since OHA's Decision already remanded (iv), OHA understands Ms. Apodaca's Motion for Reconsideration to address (i)-(iii).

II. Analysis

The DOE FOIA regulations do not explicitly provide for reconsideration of a final Decision and Order. *See* 10 C.F.R. § 1004.8. However, in prior cases, we have used our discretion to consider Motions for Reconsideration where circumstances warrant. *See, e.g., Dallas D. Register*, 28 DOE ¶ 80,218 (2002). In reviewing such requests for reconsideration, we may look to Subpart E of 10 C.F.R. Part 1003, OHA's general administrative rules regarding modification or rescission of its orders. *See, e.g., Ron Vader*, 23 DOE ¶ 80,183 (1994). Those regulations provide that an application for modification or rescission of an order shall be processed only when the application demonstrates that it is based on significantly changed circumstances, defined in pertinent part as "a substantial change in the facts or circumstances upon which an outstanding . . . order of the OHA affecting the applicant was issued, which change has occurred during the interval between issuance of such an order and the date of the application and was caused by forces or circumstances beyond the control of the applicant." 10 C.F.R. §§ 1003.55(b)(1), (b)(2)(iii).

Relevant here, "significantly changed circumstances" includes "the discovery of material facts that were not known or could not have been known at the time of the proceeding and action upon which the application is based. . . ." 10 C.F.R. § 1003.55(b)(2)(i); *see also Econ. Regulatory Admin.*, 14 DOE ¶ 82,502 (Mar. 10, 1986) (*ERA*) (denying a motion for reconsideration where the appellant provided material information in its motion that it had at the time of appeal).

A FOIA appeal must be in writing, addressed to the OHA director, and OHA must receive the appeal within thirty days after the requester receives the determination. 10 C.F.R. §§ 1004.8(a)-(c).

OHA addresses in turn the issues that Ms. Apodaca raises in her Motion. First, OHA appreciates that Ms. Apodaca contacted the NNSA to resolve her concerns informally. However, that does not save her appeal from being untimely. The regulations required her to submit her appeal within thirty days of receiving the determination. The regulations simply do not allow for the flexibility that Ms. Apodaca seeks. Even if they did allow for that flexibility, Ms. Apodaca's Aug. 31, 2007 e-mail speaks to (iii) and (iv). Ms. Apodaca's appeal regarding (i) and (ii) was denied because her appeal was untimely. The NNSA's search regarding (iii) was upheld on appeal, and OHA remanded the case to the NNSA so that it could conduct a search regarding (iv). Therefore, Ms. Apodaca does not present a material fact that shows significantly changed circumstances that can lead us to modify our Decision that her appeal regarding (i) and (ii) was untimely.

Next, Ms. Apodaca asks OHA to modify or rescind its Decision that the NNSA's search regarding (iii) was adequate. Ms. Apodaca states that the NNSA employees who processed Ms. Apodaca's FOIA request for information on breaches earlier provided Ms. Apodaca documents regarding the breach described in (iii). However, following *ERA*, because Ms. Apodaca knew this fact but did not present it to OHA at the time of her appeal, this fact is not a basis for OHA to reconsider its Decision.

Ms. Apodaca also asks OHA to remand portions of her case “in total for additional processing” because she is “being treated with less respect and credibility than other [FOIA requesters]. . . .” However, this is not a basis upon which OHA may grant Ms. Apodaca’s Motion for Reconsideration.

Lastly, Ms. Apodaca states that OHA and the NNSA Service Center failed to address the portion of her appeal pertaining to Mr. Speidel not responding to her FOIA request. 10 C.F.R. Part 1004 does not allow OHA to review the timeliness of the determination issuer’s response. If Ms. Apodaca properly submitted a FOIA request to an authorizing official who did not respond within the statutory deadline, she has a right of review in federal court. *See* 10 C.F.R. §§ 1004.5(d)(1)-(4).

It Is Therefore Ordered That:

- (1) The Motion for Reconsideration that Ms. Apodaca filed on December 21, 2007, OHA Case No. TFA-0237, is denied.
- (2) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Fred L. Brown
Associate Director
Office of Hearings and Appeals

Date: January 28, 2008